

Employed vs Self Employed

The line between whether an individual is employed or self employed is grey. In this article Louise Moyne provides guidance and case law examples to help you define the line.

Employed versus self employed? A question which has caused great interest and controversy in recent years. One may think it's a simple question, and it is, but as for the answer, now that's something completely different!

It can be difficult to determine if an individual is employed or self employed. Generally,

- A contract *of* service between two parties implies a contract of employment subsists.
- A contract *for* service implies the self employed status of the service provider.

The key issue of practical interest is that a contract of service obliges the employer to operate PAYE as the employee is taxable under Schedule E, and the employer carries all the associated tax responsibilities.

Under a contract for service the individual is liable to tax under Schedule D Case I and is obliged to file under the self assessment system. The person making the payment has no further tax responsibility.

Practical Issues

Prospective engagers of service should review the tax and PRSI implications. Employers have the potential additional 10.75% employer PRSI, obligations under employment law, possible pension commitments and insurance obligations.

The service providers may have the option to offset costs of providing the service in computing their taxable income if self employed. The flip side of self employment attracts other issues including social welfare entitlements (or lack of), the absence of holiday and sick pay etc.



Louise Moyne is Principal of LM Tax Consulting Limited and an Associate of the Irish Taxation Institute.

► Continued on Page 28

How Do You Manage Your Accounts?

This Or **This**

www.bigredbook.com
Call Now On 1890334555, E-mail: sales@bigredbook.com

► Continued from Page 27

The incorrect treatment of an individual could be potentially expensive for an employer where PAYE should have been operated and those obligations were not adhered to. For example, the payments made to the individual would be treated as net pay and the tax liability would then be computed by regrossing that net figure for tax purposes. But Revenue will hold the employer liable for the taxes/levies etc due – and not the employee. Whether the employer can recoup the tax from the employee is another matter.

It is important to note that the expression of doubt provisions in S. 955(4) TCA 1997 do not extend to situations where an individual is uncertain as to whether employed v self employed status applies. (e-Brief No 05 2010).

The terms “employed” and “self employed” are not defined in the Taxes Acts or in The Social Welfare Consolidated Act (SWCA) 2005, and no exhaustive list has been compiled to determine the employment status. However, as a result of case law, tests have been developed to assist in determining a taxpayer’s status. These are not applied mechanically and each case should be considered on its own merits.

The Control Test

To determine the relationship between the two parties the element of control that the employer can exercise over the employee must be reviewed. In an Irish case *Roche v Kelly [1969] IR 100* it was held that the right of the master to direct the servants as to what and how the work is to be done was a main factor in determining the relationship between the parties. The case arose out of an injury suffered by an individual during the construction of a barn for a farmer. The question was whether the injured party was an employee of the farmer. The right to interfere with how the individual carried out their work and the fact that the farmer did not exercise control over the individual were important findings and became known as the control test.

It is not always clear whether this level of control applies, as was demonstrated in a later Irish case of *Re Sunday Tribune [1984] HC*. The difficulties in the control test were recognised where skilled workers were told what to do but not how to do it. In this case two journalists were doing similar work. The distinction was in how the work was done by each journalist. It was held that one was an integral part of the Sunday Tribune while the other was a freelance contributor.

Obviously further clarification was required and additional tests were laid down following the case of *Ready Mix Concrete (SE) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497* i.e.

- The mutual obligations test – if there is no obligation on the employer to offer work or on the other party to do the work, there is no contract of service.
- Whether the employee agrees that he will be subject to the other’s control expressly or impliedly to a sufficient degree to make the other party his employer.
- Whether the provisions of the contract are consistent with it being a contract of service e.g. employer’s financial risk, employees entitlement to holiday pay, pension etc., employer’s opportunity to profit.

In this case the individuals had been previously employed as drivers by Ready Mix Concrete. They entered into a different relationship; they leased the lorries under one contract and agreed to deliver concrete under another contract for the company. Their new obligation was to deliver concrete in their own lorries as opposed to that of providing work and skill by driving the company lorries, as before. The drivers were determined to have contracts for service and taxed as self employed. However, on its own this test is unlikely to be conclusive.

The Supplier’s Own Business Test

A major difference in employed v self employed is the question of the performance of the service as a person in business on their own account. The Ready Mix case reviewed the contract in the light of this question, who really was the risk taker, the entrepreneur?

The UK case of *Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173* established some important factors in considering if a contract of or for service exists, namely:

- Does the person performing the services supply his own equipment?
- Can he hire his own helper(s)?
- Does he carry financial risks and to what extent?
- What opportunity does he have to make a profit?
- To what extent does he carry the responsibility for investment / management?

Clearly, if the individual supplies the equipment, the staff, takes the risk and manages the business he is acting in the capacity of self employed and not as employee.

The Intention of the Parties

The facts of each case will determine whether the contract is of or for service. However, the intentions of the parties cannot be overlooked and may be important.

The Economic Test

The case of *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare [HC 1995] [SC 1998] 1 IR 34* considered various tests and criteria in determining the status of the contract. It introduced the economic test which examines if the individual is economically independent from the person requiring the work to be done.

The case related to the status of a supermarket demonstrator whose job was to offer free samples to shoppers. The demonstrator was paid by the supplier of the free samples.

Tests applied were

- Control test – The demonstrator (she) was found to be under the control and direction of and could be dismissed by the employer.
- Integration Test (Integral to the business) – she was considered to be an integral part of the supplier’s business.
- Own Business Test – she was found not to be in business. She could not profit from her services.
- Economic Test – The engagement terms were consistent with those of a contract of service. She was not supplying equipment, or taking risk.

Revenue recently published the Code of Practice for Determining Employment or Self Employment Status of Individuals. This is an important and useful reference tool; however, these guidelines are not legally binding and are subject to interpretation based on case law and legislation. They state the overriding factor to be taken into account is whether the individual is performing the work as a person in business on their own account.

Conclusion

As is evident the line between whether an individual is self employed or employed can be grey. If an individual works for a person who is found to be their employer when both parties regarded that individual as self employed then the potential financial exposure to that “employer” can be significant. The inability of a potential “employer” to rely on the expression of doubt to mitigate interest on overdue tax means that this is an area where caution is necessary and professional advice is essential. This is an area where “employers” puts themselves in harm’s way and as advertisements commonly say “read instructions carefully”!

****This article was written before the release of Budget 2012 and does not take into account any measures announced in Budget 2012.**